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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 762

EDWARD R. WILLIAMS and JULIA LEE COX WILLIAMS for Themselves and Doing Business as WILLIAMS ENGINEERING COMPANY, a Partnership,

Petitioners,

vs.

THE BABCOCK & WILCOX COMPANY and REPUBLIC STEEL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below.

The opinion of the Court of Appeals for the Third Circuit is reported at 262 F. 2d 253. The opinion of the District Court (483a-534a*) is unreported except in 120 U. S. P. Q. 160.

* Page references to appellants' (petitioners here) appendix in the Court of Appeals are followed by the letter "a"; page references to appellees' (respondents here) appendix in the Court of Appeals are followed by the letter "b".

Jurisdiction.

The basis of this Court's jurisdiction is adequately set forth in the Petition. The jurisdiction of the District Court depended on diversity of citizenship (9a).

Questions Presented.

1. Whether the findings of fact made by the District Court were "clearly erroneous" (Fed. R. Civ. P. 52a).

2. Whether the pre-trial discovery and other rulings of the District Court were "inconsistent with substantial justice" (Fed. R. Civ. P. 61) and "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" (Rule 19 of this Court).

Statement of the Case.

The contract in suit (18a-43a) contemplated the development of a process for the continuous casting of steel which could be licensed to the steel industry and which would produce royalties to be shared by the parties to the contract. Petitioners' contribution to the endeavor consisted of certain patents; respondents were to do the development work at their own expense and respondent The Babcock & Wilcox Company ("B&W") was "to use its best efforts to exploit and license a continuous casting process" (26a).

The contract was executed in 1946 and provided in paragraph 16(b) as follows (39a):

> "(b) In the event the gross use royalties collected by B. & W. from sublicensees for the calendar year 1952, or for any calendar year thereafter does not exceed $75,000, then any of the parties may, by a notice in writing served on the other parties within

sixty (60) days thereafter, terminate this agreement, and such termination shall become effective thirty (30) days after receipt of such notice."

Despite ten years of work and the expenditure by respondents of over $2,500,000 (including the payment of $70,000 to petitioners), the process was never developed to "the point of commercial utility or success where Babcock & Wilcox should in good faith have offered the process to the public for licensing" (262 F. 2d at 256; Appendix to Petition, p. 22); B&W therefore was never able to obtain any licenses or to collect any royalties.

In 1956, respondents gave notice to petitioners that the contract would be terminated in accordance with the terms of the above quoted paragraph 16(b) of the contract.

Petitioners sued in the District Court to enjoin termination of the contract or for damages, claiming that the process had in fact been developed to the point of commercial success by 1952, that respondents could and should have granted licenses and that such licenses could and should have yielded royalties in excess of $75,000 per year. Petitioners claimed also a "promissory estoppel" based on alleged promises by respondents that licenses would be issued; the claim seems to be that but for such promises, petitioners themselves would have terminated the contract and "recaptured" their patents (Petition, p. 6).

At pretrial conferences, it was recognized (e.g. 9b) that in terminating the contract in suit respondents had acted precisely in accordance with its provisions. Not having collected $75,000 in royalties for a calendar year, any party had a right to terminate the contract (39a). The District Court believed, therefore, that the case turned on whether the process had reached such a point that respondents could have and should have licensed it and could have and should have secured $75,000 in royalties in the relevant calendar year (67a-68a, 70a, 81a, 493a). The term "commercial success" was used as shorthand for the issue thus phrased

and the District Court directed trial of this essential issue. Counsel for petitioners consented to and agreed with this procedure (66a, 67a-68a, 70a, 73a, 80a, 83a-84a, 5b, 7b, 10b, 13b).

The District Court for the Western District of Pennsylvania (Judge JOSEPH P. WILLSON) dismissed the complaint on the merits after a seven-day trial (6a) in which there was oral testimony by six witnesses. The District Court opinion is a careful and detailed analysis of the oral testimony and documentary evidence. The District Court found that there was no breach of the contract (529a), that there was "the utmost good faith on the part of defendants' officers and personnel engaged in the work" (521a-522a), that defendants "acted honestly and in good faith in an attempt to successfully develop the process" (530a) but that "the point was never reached where B&W should have offered the process for licensing" (532a).

The judgment of the District Court was affirmed unanimously by the Court of Appeals (Circuit Judges MARIS, GOODRICH and KALODNER), with an opinion which again demonstrates a careful and detailed analysis of the evidence.

ARGUMENT

I.

The decision below is clearly correct.

The crucial finding of the District Court was as follows (532a):

> "I find that the point was never reached where B&W should have offered the process for licensing."

In addition to overwhelming evidence from respondents themselves, this finding was supported by the testimony of a disinterested witness, Hjalmar W. Johnson, vice-president

and director of Inland Steel Corporation, who had investigated for his company *all* processes for continuous casting, including that on which respondents were working (104b-150b).

The Court of Appeals agreed with the District Court (262 F. 2d at 257 and at 258), found "ample support in the record for the findings of the District Court" (262 F. 2d at 258), and found other contentions of petitioners to be "wholly without merit" (262 F. 2d at 259).

Now petitioners ask this Court to reexamine the concurrent findings of fact by the Court of Appeals and the District Court.

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."
>
> *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949).

No "very obvious and exceptional showing of error" can be made here, for there is abundant evidence that despite the good faith efforts of respondents, the process was not ripe for licensing because it had not been developed to a practical point where it could be used with commercial success (*e.g.*, 58b-60b, 123b-138b, 399b-404b, 210b-212b, 219b-220b, 232b-233b, 236b-237b, 251b-252b, 261b-266b).

Petitioners suggest (Petition, p. 13) that Rule 52(a) of the Federal Rules of Civil Procedure is not applicable to this action. We cannot take such a suggestion seriously since the Rule itself expressly states that it is applicable to "*all* actions tried upon the facts without a jury" (italics ours). It is absurd to represent that the case at bar is to be excepted from Rule 52(a).

Moreover, the result would have been the same in the Court of Appeals regardless of Rule 52(a). This is because,

after its review of the evidence, the Court of Appeals expressed its agreement with the District Court (262 F. 2d at 257 and at 258).

II.

The decision below is not in conflict with any decision of this Court.

Petitioners attempt to justify their application for a writ by a statement that "[t]he Court of Appeals has also applied Rule 52(a) contrary to the law as laid down by this Court" (Petition, p. 12). *U. S.* v. *United States Gypsum Co.*, 333 U. S. 364 (1948) is cited in support, specifically at pages 394, 395, and 396.

The *Gypsum* case, as it concerns appellate review of findings of fact, teaches that

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (333 U. S. at 395).

In the case at bar, the Court of Appeals not only applied this principle but did so knowingly and cited the *Gypsum* case for the principle set forth in the language quoted (262 F. 2d at 256, 257; Appendix to Petition, p. 23). The Court of Appeals measured the documents against the testimony of witnesses and found no conflict. The Court of Appeals stated: "We have carefully examined these documents . . . we agree with the District Court in this regard" (262 F. 2d at 257; Appendix to Petition, pp. 23-24).

III.

The decision below did not depart "from the accepted and usual course of judicial proceedings" (Rule 19 of this Court).

Petitioners argue that procedural errors were committed in the District Court and call upon this Court "to exercise its supervisory powers . . . to correct these violations of Plaintiff's constitutional rights" (Petition, p. 15).

The argument is without the slightest merit.

A.

Petitioners complain of a pretrial ruling which is alleged to have confined the trial to the single issue of "commercial success". Petitioners fail to point out that they agreed in open court that the evidence should at the outset be directed to the basic question whether the respondents acted justifiably and in good faith in terminating the contract (79a-80a; see 67a-68a, 83a-84a, 5b, 7b, 10b).

Ignoring their own acquiescence in the pretrial ruling, petitioners attempt to build upon it the argument that the District Court erroneously disposed after trial of all of the issues in the case after precluding proof of petitioners' promissory estoppel theory. The argument presents no question to invoke this Court's power of supervision of the federal courts.

First, the basic issue of commercial success cannot be considered in isolation from the contention that respondents, by promising to petitioners that they would license the process, induced petitioners to forego serving their own notice of termination prior to 1956. Licenses could be issued and royalties earned only if the process was commercially successful. The finding of both courts below that the process was not commercially successful refutes petitioners' contention of promises by respondents that licenses would be issued.

Second, there was no preclusion of petitioners' proof. Mr. Williams did, in fact, testify to the assurances he allegedly received (151a) and the District Court received in evidence his memoranda of conversations in which the alleged promises were made (131a-138a), together with correspondence with respondents in this connection (138a-148a) and respondents' pleading admissions with respect to the promissory estoppel theory (93a-94a).

Third, petitioners could not in any event "recapture" their patents by terminating the agreement prior to 1956; the contract in suit provides that respondents' licenses would survive termination of the contract (28a).*

In rejecting the promissory estoppel contention, the District Court *assumed* reliance by petitioners (530a), but found as a fact that no promises were made (530a-531a). This finding, too, was carefully considered and affirmed by the experienced panel of the Court of Appeals (Petition, pp. 23-25).

B.

Finally, petitioners seek review of rulings made in the course of pretrial discovery; petitioners contend that documents as to which they were denied discovery were put in evidence by respondents. Wholly apart from the question whether the discovery rulings were right or wrong, the record citations given in the petition in this connection (p. 9) demonstrate that petitioners were not prejudiced. Some of the documents were not prepared by respondents but were reports prepared by employees of Inland Steel, a company which is not a party to the litigation (298a). With respect to other documents, it is uncertain that they were withheld from petitioners (302a, 303a); these and other documents as to which any question was raised were given to petitioners at the trial for study overnight (302a,

* Petitioners conceded in their brief in the Court of Appeals (p. 31) that their principal patent expired in 1954.

303a, 537a-540a). In any event, the documents in question were received subject to a motion to strike (541a). Petitioners made no such motion (548a) and should not be heard to complain in this Court that reception of the documents was prejudicial error.

CONCLUSION.

This petition for a writ of certiorari should be denied.

Respectfully submitted,

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